UNITED
NATIONS

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Security Council

Distr.
GENERAL

S/AC.26/1999/5
19 March 1999

Original: ENGLISH

UNITED NATIONS
COMPENSATION COMMISSION
GOVERNING COUNCIL

REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING THE SECOND INSTALMENT OF "E3" CLAIMS

GE.99-60995

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Introduction

1. The Governing Council of the United Nations Compensation Commission (the "Commission") appointed the present Panel of Commissioners (the "Panel"), composed of Messrs. Werner Melis (Chairman), David Mace and Sompong Sucharitkul, at its twenty-second session in October 1996 to review construction and engineering claims filed with the Commission on behalf of corporations and other legal entities in accordance with the relevant Security Council resolutions, the Provisional Rules for Claims Procedure (S/AC.26/1992/10)(the "Rules") and other Governing Council decisions. This report contains the recommendations to the Governing Council by the Panel, pursuant to article 38(e) of the Rules, concerning eight claims included in the second instalment. Each of the claimants seeks compensation for loss, damage or injury allegedly arising out of Iraq's 2 August 1990 invasion and subsequent occupation of Kuwait.

2. The claims submitted to the Panel in this instalment and addressed in this report were selected by the secretariat of the Commission from among the construction and engineering claims (the "E3 Claims") on the basis of criteria established under the Rules. These include the date of filing with the Commission and compliance by claimants with the requirements established for claims submitted by corporations and other legal entities ("category 'E' claims").

I. PROCEDURAL HISTORY

A. The nature and purpose of the proceedings

3. The status and functions of a Panel of Commissioners operating within the framework of the Commission are set forth in the report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 687 (1991) dated 2 May 1991 (S/22559). Pursuant to that report, the Commission is a fact-finding body that examines claims, verifies their validity, evaluates losses, recommends compensation, and makes payment of awards.

4. Within the Commission, the Panel has been entrusted with three tasks in its proceedings. First, the Panel determines whether the various types of losses alleged by the claimants are within the jurisdiction of the Commission. Secondly, the Panel verifies whether the alleged losses are in principle compensable and had in fact been incurred by a given claimant. Thirdly, the Panel determines whether these compensable losses were incurred in the amounts claimed.

B. The procedural history of the claims in the second instalment

5. On 22 April 1998, the Panel issued a procedural order relating to the claims. In view of the complexity of the issues raised, the volume of the documentation underlying the claims and the compensation sought by the

claimants, the Panel decided to classify each of the claims as "unusually large or complex" within the meaning of article 38(d) of the Rules. The Panel thus decided to complete its review of the claims within 12 months of the date of its procedural order.

6. The Panel performed a thorough and detailed factual and legal review of the claims. The Panel considered the evidence submitted by claimants in response to requests for information and documents. It also considered Iraq's responses to the factual and legal issues raised in the twenty-first report of the Executive Secretary issued on 8 October 1997 in accordance with article 16 of the Rules.

7. After a review of the relevant information and documentation, the Panel made initial determinations as to the compensability of the loss elements of each claim. Pursuant to article 36 of the Rules, the Panel retained as its expert consultants a loss adjusting firm with international and Persian Gulf experience to assist the Panel in the quantification of losses incurred in large construction projects. The Panel then directed the expert consultants to prepare comprehensive reports on each of the claims, stating their opinions on the appropriate valuation of each of the compensable losses and setting forth the evidence supporting those opinions. The Panel reviewed those reports with the expert consultants.

8. In drafting this report, the Panel has not included specific citations to restricted or non-public documents that were produced or made available to it for the completion of its work.

C. The claims

9. This report contains the Panel's findings with respect to the following claims:

(a) Agrocomplect Co., a corporation organized under the laws of the Republic of Bulgaria, which seeks compensation in the amount of US$55,934,647 for losses allegedly caused by Iraq's invasion and occupation of Kuwait;

(b) The China Road and Bridge Corporation, a state enterprise licensed in the People's Republic of China, which seeks compensation in the amount of US$67,340,959 for losses allegedly caused by Iraq's invasion and occupation of Kuwait;

(c) Industrogradnja d.d., a company organized under the laws of the Republic of Croatia, which seeks compensation in the amount of US$17,573,758 for losses allegedly caused by Iraq's invasion and occupation of Kuwait;

(d) Energoprojekt Building and General Contracting Company Limited, a company registered under the laws of the Federal Republic of Yugoslavia,

which seeks compensation in the amount of US$27,073,424 for losses allegedly caused by Iraq's invasion and occupation of Kuwait;

(e) Indian Railway Construction Company, a public sector enterprise organized under the laws of the Republic of India, which seeks compensation in the amount of US$106,430,570 for losses allegedly caused by Iraq's invasion and occupation of Kuwait;

(f) Hanyang Corporation, a company organized under the laws of the Republic of Korea, which seeks compensation in the amount of US$13,552,641 for losses allegedly caused by Iraq's invasion and occupation of Kuwait;

(g) Arcom S.A. Bucharest, a company organized under the laws of Romania, which seeks compensation in the amount of US$38,352,000 for losses allegedly caused by Iraq's invasion and occupation of Kuwait; and

(h) Freeport McMoran Resource Partners, a corporation organized under the laws of United States of America, which seeks compensation in the amount of US$10,301,346 for losses allegedly caused by Iraq's invasion and occupation of Kuwait.

II. LEGAL FRAMEWORK

A. Applicable law

10. As set forth in paragraphs 16-18 and 23 of the "Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of 'E3' Claims" (S/AC.26/1988/13)(the "First Report"), the Panel determined that paragraph 16 of Security Council resolution 687 (1991) reaffirmed the liability of Iraq and defined the jurisdiction of the Commission. The Panel applied Security Council resolution 687 (1991), other relevant Security Council resolutions, decisions of the Governing Council, and, where necessary, other relevant rules of international law.

B. The "arising prior to" clause

11. The Panel adopted the following interpretation of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) with respect to contracts to which Iraq was a party:

(a) the phrase "without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through normal mechanisms" was intended to have an exclusionary effect on the Commission's jurisdiction, i.e., that such debts and obligations could not be brought before the Commission;

(b) the period described by "arising prior to 2 August 1990" should be interpreted with due consideration to the purpose of the phrase, which was to exclude Iraq's existing bad debts from the Commission's jurisdiction;

(c) the terms "debts" and "obligations" should be given the customary and usual meanings applied to them in ordinary discourse; and

(d) the use of a three month payment delay period to define the jurisdictional period is reasonable and consistent both with the economic reality in Iraq prior to the invasion and with ordinary commercial practices.

12. The Panel finds that a claim relating to a "debt or obligation arising prior to 2 August 1990" means a debt for payment that is based on work performed or services rendered prior to 2 May 1990.

C. Application of the "direct loss" requirement

13. The Governing Council's decision 7 (S/AC.26/1991/7/Rev.1), decision 9 (S/AC.26/1992/9) and decision 15 (S/AC.26/1992/15) provide specific instructions to the Panel regarding the interpretation of the "direct loss" requirement. Applying these decisions, the Panel examined the loss types presented in the claims to determine whether, with respect to each loss element, the requisite causal link - a "direct loss" - was present.

14. The Panel made the following findings regarding the meaning of "direct loss":

(a) with respect to physical assets in Iraq and in Kuwait on 2 August 1990, a claimant can prove a direct loss by demonstrating that the breakdown in civil order in those countries, which resulted from Iraq's invasion and occupation of Kuwait, caused the claimant to evacuate its employees and that the evacuation resulted in the abandonment of the claimant's physical assets;

(b) with respect to losses relating to contracts to which Iraq was a party, Iraq may not rely on force majeure or similar legal principles as a defense to its obligations under the contract;

(c) with respect to losses relating to contracts to which Iraq was not a party, a claimant may prove a direct loss if it can establish that Iraq's invasion and occupation of Kuwait or the breakdown in civil order in Iraq or Kuwait following the invasion caused the claimant to evacuate the personnel needed to perform the contract;

(d) costs incurred in taking reasonable steps to mitigate the losses incurred by the claimant are direct losses, bearing in mind that the claimant was under a duty to mitigate any losses that could reasonably be avoided after the evacuation of its personnel from Iraq or Kuwait; and

(e) the loss of use of funds on deposit in Iraqi banks is not a direct loss unless the claimant can demonstrate that Iraq was under a contractual or other specific duty to exchange those funds for convertible

currencies and to authorize the transfer of the converted funds out of Iraq and that this exchange and transfer was prevented by Iraq's invasion and occupation of Kuwait.

D. Liability of Iraq

15. "Iraq" as used in decision 9 means the Government of Iraq, its political subdivisions, or any agency, ministry, instrumentality or entity (notably public sector enterprises) controlled by the Government of Iraq. At the time of Iraq's invasion and occupation of Kuwait, the Government of Iraq regulated all aspects of economic life other than some peripheral agriculture, services and trade. (See Iraq Country Profile 1990-91, Economist Intelligence Unit, London, 1990, p.10).

E. Date of loss

16. The Panel must determine "the date the loss occurred" within the meaning of Governing Council decision 16 (S/AC.26/1992/16) for the purpose of recommending compensation for interest and for the purpose of determining the appropriate exchange rate to be applied to losses stated in currencies other than in United States dollars.

17. With respect to the eight claims that are the subject of this report, the Panel finds that the losses occurred during the period of Iraq's occupation of Kuwait from 2 August 1990 to 2 March 1991. It is impractical for the Panel to determine with precision the date of each individual loss that underlies the claim at issue. Accordingly, the Panel uses 2 August 1990 as the date of loss, unless otherwise established, for the claims included in this report.

F. Interest

18. On the issue of the appropriate interest rate to be applied, the relevant Governing Council decision is also decision 16. According to that decision, "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award". In decision 16 the Governing Council further specified that "[i]nterest will be paid after the principal amount of awards", while postponing decision on the methods of calculation and payment of interest.

19. The Panel finds that interest shall run from the date of loss, or, unless otherwise established, on 2 August 1990.

G. Currency exchange rate

20. While many of the costs incurred by the claimants were denominated in currencies other than United States dollars, the Commission issues its awards in that currency. Therefore, the Panel is required to determine the

appropriate rate of exchange to apply to losses expressed in other currencies.

21. The Panel finds that the exchange rate set forth in the contract is the appropriate rate for losses under the relevant contracts because this was specifically bargained for and agreed to by the parties.

22. For non-contractual losses, the Panel finds the appropriate exchange rate to be the prevailing commercial rate, as evidenced by the United Nations Monthly Bulletin of Statistics on the date of loss, or, unless otherwise established, on 2 August 1990.

H. Evacuation losses

23. In accordance with paragraph 21(b) of decision 7 of the Governing Council, the Panel finds that the costs associated with evacuating and repatriating employees from Iraq between 2 August 1990 and 2 March 1991 are compensable to the extent that such costs are proven by the claimant. Compensable costs consist of temporary and extraordinary expenses relating to evacuation and repatriation, including transportation, food and accommodation.

I. Valuation

24. The Panel developed, with the assistance of the secretariat and the Panel's expert consultants, a verification program that addresses each loss item. The valuation analysis used by the Panel's expert consultants ensures clarity and consistency in the application of certain valuation principles to the construction and engineering claims.

25. After receipt of all claim information and evidence, the Panel's expert consultants applied the verification program. Each loss element was analysed individually according to a set of instructions. The expert consultants' analysis resulted in a recommendation of compensation in the amount claimed, an adjustment to the amount claimed, or a rejection of the amount claimed for each loss element. In those instances where the Panel's expert consultants were unable to respond decisively, the issue was brought to the attention of the Panel for further discussion and development.

26. For tangible property losses, the Panel adopted historical cost minus depreciation as its primary valuation method.

27. Additionally, the Panel's expert consultants verified all calculations in a claim, including all calculations within a statement of claim and the evidence submitted.

28. At Panel meetings, the Panel's expert consultants presented to the Panel claim-specific reports. These reports include, but are not limited to:

(a) the claimant's name and identifying claim number;

(b) a table detailing the amount claimed and the amount for reclassified losses in United States dollars (or other currency shown on the claim form) by loss element and total;

(c) a brief description of the nature of the claimant's business and the project for which the claimant performed work, if any;

(d) the date that the claimant ceased work and the date that the claimant recommenced work, if known;

(e) an analysis of the evidence submitted and the basis of the valuation recommendation for each loss element; and

(f) a recommendation of compensation, if any, by category of loss and total for all categories, with explanatory comments.

J. Evidentiary requirements

29. Pursuant to article 35(3) of the Rules, corporate claims must be supported by evidence sufficient to demonstrate the circumstances and amount of the claimed loss. The Governing Council has made it clear in paragraph 5 of decision 15 that, with respect to business losses, there "will be a need for detailed factual descriptions of the circumstances of the claimed loss, damage or injury" in order to recommend compensation.

30. The category "E" claim form requires all corporations and other legal entities that have filed claims to submit with their claim form "a separate statement explaining its claim ('Statement of Claim'), supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss". In addition, claimants were instructed to include with the statement of claim the following:

"(a) The date, type and basis of the Commission's jurisdiction for each element of loss ...;

(b) The facts supporting the claim;

(c) The legal basis for each element of the claim;

(d) The amount of compensation sought, and an explanation of how this amount was arrived at."

31. In those cases where the original submission of the claim inadequately supported the alleged loss, the secretariat prepared and issued a written communication to the claimant pursuant to the Rules requesting specific information and documentation regarding the loss ("claim development letter"). In reviewing the subsequent submissions, the Panel noted that in

many cases the claimant still did not provide sufficient evidence to support its alleged losses.

32. The Panel is required to determine whether these claims are supported by sufficient evidence and, for those that are so supported, must recommend the appropriate amount of compensation for each compensable claim element. This requires the application of relevant principles of the Commission's rules on evidence and an assessment of the loss elements according to these principles. The recommendations of the Panel are set forth in the following chapters.

III. CLAIM OF AGROCOMPLECT CO.

33. Agrocomplect Co. ("Agrocomplect") is a Bulgarian corporation that performed work on engineering projects in Iraq commencing in 1978. The stated losses relate to work performed on the Hilla-Diwaniya 4 Land Reclamation Project ("Contract No. 65") in Iraq for the State Organization for Land Reclamation, operating under the authority of the Ministry of Irrigation of the Republic of Iraq. Agrocomplect seeks compensation in the amount of US$55,934,647 for contract losses, tangible property losses, the evacuation of Bulgarian workers from Iraq and loss of business reputation.

Table 1. Agrocomplect's claim

Claim element	Claim amount (US$)
A. Contract losses	17,062,296
B. Tangible property losses	38,201,079
C. Payment or relief to others	188,272
D. Loss of business reputation	483,000
Total	55,934,647

A. Contract losses

1. Facts and contentions

34. Agrocomplect seeks compensation in the amount of US$17,062,296 for unpaid work that Agrocomplect performed on the project and for miscellaneous and consequential expenses that are not, strictly speaking, contract-related expenses.

35. Agrocomplect commenced work on the project in 1985 under Contract No. 65. The project contract provided for work to be performed in eight separate zones. Agrocomplect stated that four of these zones were completed and handed over to the Iraqi employer and that the remaining four zones were not handed over due to Iraq's invasion and occupation of Kuwait.

36. Agrocomplect further stated that it was not paid for work completed on zone 9 of the project under an annex to the project contract, one third of which was completed by 2 August 1990. The remaining works on zone 9 continued (on a reduced basis) until 15 January 1991, when they were suspended because of "the deadline fixed by the United Nations".

37. On 13 January 1991, Agrocomplect formally notified the Iraqi administration that, as a result of the imposed economic blockade and the ensuing circumstances, Agrocomplect was not in a position to proceed with its work on the project.

2. Analysis and valuation

(a) Unpaid work and retention money

38. Agrocomplect seeks compensation for unpaid work in the amount of US$177,100 and, for unpaid retention money on the construction works completed at the end of 1990, in the amount of US$3,330,333. Agrocomplect stated that the records concerning the executed construction works were kept at its Baghdad office and were destroyed by fire.

39. The documents submitted by Agrocomplect include correspondence dated between August 1991 and February 1992 concerning Agrocomplect's request for compensation from the Iraqi employer. Agrocomplect did not provide a copy of Contract No. 65 relating to the Hilla-Diwaniya 4 Project or the annex relating to zone 9. Agrocomplect did not explain its calculation of the amounts due for retention money.

40. Agrocomplect also provided a letter dated 3 June 1992 from the Iraqi State Commission of Irrigation and Reclamation Projects to the Iraqi State Commission of Customs requesting a clearance certificate for Agrocomplect to settle the final account. The letter states that work commenced on the project on 12 March 1985 and that monthly advances were paid to Agrocomplect. It further states that the work carried out by Agrocomplect was satisfactorily completed.

41. The Panel finds that Agrocomplect did not demonstrate that its losses on Contract No. 65 were the direct result of Iraq's invasion and occupation of Kuwait. Agrocomplect continued to work on the project until the middle of January 1991. At that time, Agrocomplect stated that it was unable to continue on the project because of the economic blockade.

42. Further, the Panel finds that Agrocomplect did not submit sufficient evidence to support its allegations that no documents exist regarding its contract losses. Agrocomplect was the main contractor on Contract No. 65, a US$95 million project. Even acknowledging the differences in record-keeping procedures that exist in various countries, the Panel was not convinced that the only copy of Agrocomplect's records was kept in Iraq.

43. The Panel recommends no compensation for unpaid work or for retention money.

(b) Loss of rental income

44. Agrocomplect seeks compensation in the amount of US$3,685,982 for lost rental income over 155 working days between 14 January 1991 and 20 July 1991. The amount of compensation is calculated on the basis of estimated "lost opportunities" for heavy machines (30 per cent) and means of transport and communications (20 per cent). There is also an item called "quarry

inability to obtain a tax clearance certificate resulted in Agrocomplect being unable to secure the release of the performance bonds for the concluded projects.

61. Other than its statements that such losses occurred, Agrocomplect did not provide any evidence of losses related to customs and tax clearance certificates. Further, Agrocomplect did not submit a copy of its performance bond or correspondence concerning its unsuccessful attempts to secure its release of the bond.

62. The Panel recommends no compensation for customs and tax clearance certificates or for the performance bond.

(h) Unemployment insurance

63. Agrocomplect seeks compensation in the amount of US$318,184 for unemployment insurance costs for 317 people: 308 employees working on the Hilla-Diwaniya 4 Project and 9 employees working in Agrocomplect's Baghdad office. Agrocomplect did not provide a copy of the Bulgarian law which required the payment of unemployment insurance, the names of the employees to whom payments were made, or evidence that the payments were actually made.

64. The Panel finds that Agrocomplect did not submit any evidence of payment of unemployment insurance for repatriated workers.

65. The Panel recommends no compensation for unemployment insurance for repatriated workers.

(i) Branch office in Baghdad

66. For the period between 15 January and 15 July 1991, Agrocomplect seeks compensation in the amount of US$199,080 for its office rent in Baghdad, expenses incurred in maintaining the office in Baghdad, salaries of local employees for six months, salaries of five Bulgarian employees for six months in Bulgaria, expenses for protecting the project site and for collecting vehicles from the project camp.

67. The Panel finds that these losses are not the direct result of Iraq's invasion and occupation of Kuwait. Additionally, Agrocomplect did not submit any evidence to support its losses related to its office in Baghdad.

68. The Panel recommends no compensation for losses related to the branch office in Baghdad.

(j) Restart costs

69. Agrocomplect seeks compensation in the amount of US$467,293 for restart costs related to the erection of houses, production costs and recultivating terrain.

70. Based on its description of its restart costs, it appears that Agrocomplect is seeking compensation for losses that it has not yet incurred. Agrocomplect did not submit any documentation or information regarding these losses. The Panel finds that Agrocomplect may not recover for losses that are speculative and uncertain. Agrocomplect did not demonstrate that these potential losses are the direct result of Iraq's invasion of Kuwait.

71. The Panel recommends no compensation for restart costs.

3. Recommendation

72. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

73. Agrocomplect seeks compensation in the amount of US$38,201,079 for loss of equipment and machinery, campsite equipment, spare parts and supplies. Agrocomplect stated that its tangible property was either completely destroyed or stolen after Iraqi troops looted the project site, including the project office and campsite.

2. Analysis and valuation

(a) Plant, equipment and machinery

74. Agrocomplect seeks compensation in the amount of US$25,909,988 for the "total destruction, plunder and disassembly" of heavy construction machinery, transport vehicles, other machinery and equipment.

75. Agrocomplect provided a list of 10 categories of plant, equipment and machinery, together with their imputed value. The categories are: heavy construction machines, cargo vehicles, passenger vehicles, mechanical workshop, construction equipment, construction laboratory, light construction machines, carpenter's shop, concrete plant and crushing, screening and washing plant. For each category of equipment and machinery, Agrocomplect provided a more detailed list with a brief description of the relevant assets, quantities and claimed amounts in Iraqi dinars. Agrocomplect did not give details of the age, cost or the basis used to determine the value of the assets.

76. Agrocomplect also provided customs forms that demonstrate that Agrocomplect imported some plant and equipment into Iraq. However, Agrocomplect failed to identify those items of imported plant and equipment which form the basis of its claim for loss of equipment and machinery.

77. Agrocomplect also provided moving vehicle permits for some of the equipment and machinery.

78. Agrocomplect further provided an inventory list of 602 items of machinery, equipment and vehicles that were imported into Iraq between 1979 and 1990. However, the explanations submitted with Agrocomplect's claim did not make specific reference to this inventory list. The Panel's expert consultants were unable to reconcile or cross-reference the items on this list with the customs declaration forms and moving vehicle permits that were also provided.

79. The Panel finds that the customs declaration forms submitted by Agrocomplect adequately demonstrate that Agrocomplect had imported some plant and equipment into Iraq. However, Agrocomplect failed to provide adequate explanations to enable the Panel to cross-reference the inventory list of assets forming the basis of Agrocomplect's claim and the customs receipts provided.

80. Agrocomplect provided a set of photographs depicting the project site and offices which had obviously been ransacked and looted. Agrocomplect did not state when the photographs were taken. The Panel finds that, although the photographs do depict some damaged equipment, Agrocomplect failed to provide evidence of its ownership of, and the value of, the equipment and machinery.

81. Notwithstanding Agrocomplect's failure to meet the requisite evidentiary standards, the Panel requested its expert consultants to perform a valuation of the losses of equipment and machinery set forth in Agrocomplect's claim. The Panel's expert consultants applied depreciation rates appropriate for such equipment and machinery and concluded that the equipment and machinery had no commercial value on the date of the loss. Accordingly, even if the Panel were to accept the documents provided by Agrocomplect as sufficient evidence of its ownership of, and the value of, the equipment and machinery, the Panel finds that the equipment and machinery had no commercial value on the date of the loss.

82. The Panel recommends no compensation for loss of equipment and machinery.

(b) Campsite equipment, spare parts and supplies

83. Agrocomplect seeks compensation for the total destruction and plunder of its campsite equipment (US$9,054,360) and spare parts and supplies (US$3,236,731). The claim for campsite equipment includes office premises,

a canteen and kitchen, a consulting room and dental surgery, water mains and sewerage, the electrical network, purification plants and wire mesh fencing. The claim for spare parts and supplies includes tires, fuel, lubricant materials, construction materials, stores for household equipment, property and foodstuffs.

84. In support of its claim for campsite equipment, spare parts and supplies, Agrocomplect provided a list of the damaged assets together with their imputed value. Agrocomplect provided no further evidence in support of its losses, stating that all of the relevant evidence was kept at the project camp and was destroyed.

85. The Panel finds that Agrocomplect did not submit sufficient evidence of its ownership of, the value of and presence in Iraq of the campsite equipment, spare parts and supplies.

86. Notwithstanding Agrocomplect's failure to meet the requisite evidentiary standards, the Panel requested its expert consultants to perform a valuation of the losses of campsite equipment, spare parts and supplies set forth in Agrocomplect's claim. The Panel's expert consultants applied depreciation rates appropriate for such items and concluded that the campsite equipment, spare parts and supplies had no commercial value on the date of the loss. Accordingly, even if the Panel were to accept the documents provided by Agrocomplect as sufficient evidence of its ownership of, and the value of, the campsite equipment, spare parts and supplies, the Panel finds that the items claimed had no commercial value on the date of the loss.

87. The Panel recommends no compensation for campsite equipment, spare parts and supplies.

3. Recommendation

88. The Panel recommends no compensation for loss of tangible property.

C. Payment or relief to others

1. Facts and contentions

89. Agrocomplect seeks compensation in the amount of US$188,272 for the evacuation of 368 persons (312 employees and 56 family members) between 15 November 1990 and 14 January 1991.

90. Agrocomplect evacuated 94 persons by bus for a total cost of US$37,482. There were three buses which left Zakho, Iraq on 9 and 10 January 1991 for Bulgaria. The expenses claimed include fuel for the round trip, ten days accommodation for two drivers, three nights accommodation for 32 persons, depreciation expenses, customs duties and highway tolls.

91. Agrocomplect evacuated 274 persons by air for a total cost of US$150,790. The flights departed Baghdad for Sofia on 15 and 20 November 1990 and 14 January 1991. Agrocomplect stated that its claim for travel expenses includes the cost of exit visas.

92. Agrocomplect provided a list of the names of the 368 persons evacuated, together with their respective occupations, passport numbers and dates of issue, dates of entry into, and departure from, Iraq. The list was certified by the Embassy of Bulgaria, Baghdad, on 28 January 1993. Agrocomplect stated that it was unable to submit its payroll records for the employees as these records were destroyed by fire at the project camp in 1991.

93. Agrocomplect provided a copy of a letter dated 24 October 1991 from Balkan Bulgarian Airlines which stated that Agrocomplect paid the sum of US$150,790 for the evacuation of its employees by air. The same letter states that the flights from Baghdad to Sofia were operated by Iraqi Airways. The total amount stated represents an amount of US$550 per person.

2. Analysis and valuation

94. With respect to the claim for the cost of evacuation by bus, Agrocomplect did not provide any proof of payment. The Panel therefore finds that Agrocomplect did not provide sufficient evidence of this loss.

95. With respect to the claim for the cost of evacuation by air, the Panel finds that the letter from Balkan Bulgarian Airlines is sufficient evidence that Agrocomplect paid the amount of US$150,790 for the cost of the airfares. Although Agrocomplect was unable to provide its payroll records for the employees evacuated by plane, the Panel finds that the lists of names provided is sufficient under these circumstances.

3. Recommendation

96. The Panel recommends compensation in the amount of US$150,790 for payment or relief to others.

D. Loss of business reputation

97. Agrocomplect seeks compensation in the amount of US$483,000 for loss of business reputation. Agrocomplect described its loss as moral damage to the company and its employees, however, Agrocomplect did not explain the precise nature or method of calculation of such moral damage.

98. The Panel finds that moral damage or loss of business reputation is not a loss that is the direct result of Iraq's invasion and occupation of Kuwait.

99. The Panel recommends no compensation for loss of business reputation.

E. Recommendation for Agreement

Table 2. Recommended compensation for Agreement

Claim element	Claim amount (US$)	Recommended compensation (US$)
A. Contract loss	27,000,000	nil
B. Tangible property	18,201,000	nil
C. Payment of relief to crews	144,000	144,000
D. Loss of business opportunity	450,000	nil
Total	45,795,000	144,000

(26) Based on its findings regarding Agreement's claim, the Panel recommends compensation in the amount of US$144,000.

101. The China Road and Bridge Corporation ("China Road and Bridge") is a state-owned enterprise registered in Beijing, China. China Road and Bridge seeks compensation in the amount of US$67,340,959 for contract losses, loss of tangible property, payment or relief to others, loss of profits, interest and claim preparation costs. The Panel does not address claims for interest or claim preparation costs (see paragraphs 148-149 infra), therefore these items have been excluded from table 3 below.

Table 3. China Road and Bridge's claim

	Claim element	Claim amount (US$)
IV. A.	Contract losses (Iraq)	64,819,446
B.	Contract losses (Kuwait)	
	1. Work performed	494,666
	2. Prepaid rent	46,852
	Sub-total	541,518
C.	Loss of profits	138,543
D.	Tangible property	
	Vehicles	77,100
	Management office	315,544
	Sports coaches' villa	345,610
	Financial statements	272,000
	Sub-total	1,010,254
E.	Payment or relief to others	
	Airfare	502,151
	Expenses	301,739
	Death subsidies	27,308
	Sub-total	831,198
	Total	67,340,959

A. Contract losses (Iraq)

102. China Road and Bridge seeks compensation in the original amount of US$64,819,446 for contract losses on five construction contracts with the Iraq Road and Bridge Authority (the "Employer") to build the Fifth Mosul Bridge, the Fourth Mosul Bridge, the Kumait Bridge, the Khazir Bridge and the Abassiya Bridge in Iraq. The Panel has carefully examined each of the construction contracts and finds that the projects were completed between 1984 and 1988 and the final tests on completion were all finished by August of 1989.

103. As the Panel explained in its First Report, the Panel recognizes that it is often difficult to establish a fixed date for the exclusion of its jurisdiction that does not contain an arbitrary element. Persuaded by practical considerations that a three month delay period adequately reflects the business practices prevailing in Iraq at the time, and does not depart from ordinary commercial practices, the Panel adopts for this claim the conclusion that the use of the term "debt or obligation arising prior to 2

August 1990" means a debt or obligation that is based on work performed or services rendered prior to 2 May 1990. The Panel finds that the work performed on each of the five projects was completed prior to 2 May 1990.

104. China Road and Bridge entered into deferred payment agreements with the Employer for the payment of outstanding amounts. The deferred payment agreements are not new agreements, but only arrangements for the payment of existing obligations of Iraq. Accordingly, the contract losses are not within the jurisdiction of this Commission and are not compensable under Security Council resolution 687 (1991).

105. The Panel recommends no compensation for contract losses in Iraq.

B. Contract losses (Kuwait)

106. China Road and Bridge seeks compensation in the amount of US$541,61[illegible] for contract losses in Kuwait.

1. Work performed

a) Facts and contentions

107. China Road and Bridge seeks compensation in the amount of US$494,666 for certified and uncertified invoices relating to the construction of 262 houses in Kuwait. China Road and Bridge was a subcontractor for Khalifa Fikri Construction and General Trading Establishment ("Khalifa") and the employer was the National Housing Authority of Kuwait (the "Employer").

108. China Road and Bridge began construction of the housing project in October 1987. The project was scheduled for completion in October 1990. On 10 April 1990, Khalifa sent China Road and Bridge a "confirmation bill" for work completed up to the end of March 1990. China Road and Bridge acknowledged that it received partial payment for this invoice but that US$173,487 was left unpaid.

109. China Road and Bridge stated that it returned to Kuwait after the end of Iraq's occupation of Kuwait and that it was not paid for work on the project because the Employer went bankrupt and ceased operations on 7 August 1990.

110. In support of this contention, China Road and Bridge submitted a certificate dated 16 September 1996 from the Al Farai Auditing Office in Kuwait addressed to the Commission. The certificate states that the dissolution of Khalifa was decided by order of the Commercial Tribunal of Al Culya Court on 14 March 1995. The letter states that dissolution was "caused by the cruel and inhuman invasion of Kuwait".

111. For this reason, China Road and Bridge seeks compensation for payment for the unpaid balance of the certified contract payments in the amount of

US$173,487 for work performed prior to 30 March 1990. China Road and Bridge presented the "confirmation bill" issued by Khalifa, dated 30 April 1990, as evidence of its loss.

112. China Road and Bridge also seeks compensation for non-certified contract payments in the amount of US$63,477 for work performed between April and July 1990. In support of this loss, China Road and Bridge submitted a signed statement by a China Road and Bridge official that set forth the outstanding contract payments.

113. In addition, China Road and Bridge seeks retention money in the amount of US$255,780. Under the contract, retention money was to be deducted in an amount equal to 10 per cent of the money due to the subcontractor. The contract specified that 50 per cent would be due and owing after the issuance of a substantial completion certificate. The remaining 50 per cent would be released at the end of the maintenance period. The maintenance period was for a period of one year after the completion of the work to the satisfaction of Khalifa and the Employer. China Road and Bridge stated that although the project completion date was set for October 1990, it had fulfilled most of its obligations provided by the contract before 2 August 1990. China Road and Bridge added that the owner of the project for the construction of 262 houses "recovered the project by using other main contractor after the war". China Road and Bridge stated that Iraq's unlawful invasion of Kuwait caused Khalifa's bankruptcy, thereby eliminating China Road and Bridge's direct claim against Khalifa for its losses.

114. China Road and Bridge seeks compensation in the amount of US$1,922 for loss of profit on the unfinished work on the housing project.

(b) Analysis and valuation

115. The Panel has held that claimants must provide specific proof that the failure of a debtor to pay was the direct result of Iraq's invasion and occupation of Kuwait. A claimant must demonstrate that a debtor was rendered unable to pay due to insolvency or bankruptcy caused by the destruction of its business during Iraq's invasion and occupation of Kuwait.

116. The Panel notes that insolvency proceedings did, in many instances, take several years to complete following Iraq's occupation of Kuwait. This delay was attributed to the participation of many Kuwaiti corporations in the Kuwaiti Difficult Debt Settlement Program (the "Program"). Many Kuwaiti businesses took advantage of the Program in the years following the occupation. There is no indication, however, that Khalifa took part in the Program.

117. However, the Panel requires a copy of the court order or judgment indicating that the company was dissolved as a result of Iraq's invasion and occupation of Kuwait. Such a document would be evidence of the fact that

the money owed by the company is a loss directly related to Iraq's invasion and occupation of Kuwait. The Panel finds that an accountant's statement of insolvency is not sufficient proof that a Kuwaiti debtor has been adjudicated insolvent.

118. Even if the Panel accepted that Khalifa was dissolved as a result of Iraq's invasion and occupation of Kuwait, the confirmation bill submitted by China Road and Bridge indicates that all work was performed prior to 30 March 1990. The terms of payment of the contract state that Khalifa was required to make progress payments to the subcontractor within 14 days of the Employer's payment to the main contractor. The payment for work performed had been outstanding for four months prior to Iraq's invasion of Kuwait.

119. The Panel finds that China Road and Bridge did not submit sufficient evidence that failure to pay for the work performed was a direct result of Iraq's invasion and occupation of Kuwait.

(c) Recommendation

120. The Panel recommends no compensation for work performed.

2. Prepaid rent

121. China Road and Bridge seeks compensation in the amount of US$4,353 for prepaid rent on its management office located in Kuwait and in the amount of US$42,500 for prepaid rent for a villa in Kuwait. China Road and Bridge submitted the leases and receipts showing payment of rent for August and September 1990.

122. The Panel has found that prepaid rent is not an expense that is chargeable to the Employer, but part of the overheads that a contractor uses to calculate the rates charged.

123. The Panel recommends no compensation for prepaid rent.

3. Recommendation

124. The Panel recommends no compensation for contract losses in Kuwait.

C. Loss of profits

1. Facts and contentions

125. China Road and Bridge seeks compensation in the amount of US$138,543 for loss of profits on contracts held with 29 sports coaches, one translator and one cook. The Chinese sports coaches were hired by Kuwaiti sports associations to provide coaching for a variety of sports (table tennis, gymnastics, diving, volleyball and basketball). Additional agreements were

signed between China Road and Bridge and each sports coach. China Road and Bridge stated that under the relevant laws of China, a Chinese national is not entitled to work abroad unless it is with a company or an organization authorized by the Chinese Government to engage in a foreign economic cooperation business.

126. Pursuant to the terms of the contracts, the Kuwaiti sports authorities paid each sports coach a monthly salary. According to China Road and Bridge, the sports coach then turned over the monthly salary to China Road and Bridge. China Road and Bridge then paid each sports coach a monthly stipend.

127. China Road and Bridge stated that the sports coaches would have paid it a total of US$346,358 on the unfinished portions of the terminated contracts. China Road and Bridge stated that it would have made a 40 per cent profit on these contracts in the amount of US$138,543. To determine its loss of profit, China Road and Bridge used a rate of exchange of KD 1.000 to US$3.40.

128. China Road and Bridge provided copies of its agreements with 27 sports coaches, three translators and one cook. China Road and Bridge provided copies of the contracts between the sports coaches and Kuwaiti sports associations for 19 persons. For the remaining 12 persons, China Road and Bridge provided letters from the Kuwaiti sports associations stating that the persons had contracts with the specified sports association.

2. Analysis and valuation

129. The Panel finds that China Road and Bridge did not submit sufficient evidence to establish that it would have earned a profit of 40 per cent on the amounts paid under the sports coaches' contracts with the Kuwaiti sports associations. The Panel has held that a claimant must demonstrate ongoing and expected profitability by clear and convincing evidence. China Road and Bridge did not submit sufficient evidence of the living expenses paid with regard to the sports coaches in Kuwait. Without the ability to demonstrate the profit margin of the existing contract, the Panel finds that China Road and Bridge did not demonstrate by clear and convincing evidence the loss of profits that are the basis of its claim.

3. Recommendation

130. The Panel recommends no compensation for loss of profits.

D. Loss of tangible property

1. Facts and contentions

131. China Road and Bridge seeks compensation in the amount of US$1,010,254 for loss of tangible property, including vehicles, office equipment and

furniture located in the management office and villa, and for the cost of reconstituting its financial statements.

132. For the vehicles, China Road and Bridge submitted invoices, insurance certificates, vehicle licenses and witness statements that demonstrate its ownership and the presence of the vehicles in Kuwait at the time of Iraq's invasion of Kuwait. In calculating its loss, China Road and Bridge depreciated the vehicles at a rate of 10 per cent per annum for a stated loss of US$77,100.

133. With respect to the management office, China Road and Bridge submitted a list of the equipment and furniture, a statement describing the loss and a statement by the landlord confirming that the property was taken by the Iraqis. China Road and Bridge seeks US$315,544 for loss of the tangible property located at the management office.

134. China Road and Bridge stated that the villa was occupied by the sports coaches and that the tangible property located at the villa included items such as 34 colour televisions and video players, 20 gas stoves, 10 electric ovens, and 40 telephones. Although China Road and Bridge only submitted 29 contracts for the coaches, they stated that 35 sports coaches lived at the villa and that it paid US$8,500 per month in rent. China Road and Bridge did not submit an independent witness statement concerning the losses at the villa. China Road and Bridge seeks US$345,610 for the loss of tangible property located at the villa.

135. China Road and Bridge also seeks compensation in the amount of US$272,000 for the cost of reconstituting its financial statements. China Road and Bridge employed a certified public accounting firm to reconstitute its financial statements for the years 1983 to 1990. In 1993, the accounting firm estimated that reconstituting these "lost financial statements" would cost US$272,000. The work for reconstituting the financial statements began in 1996.

2. Analysis and valuation

136. The Panel finds that China Road and Bridge demonstrated that the vehicle, equipment and furniture losses were the direct result of Iraq's invasion and occupation of Kuwait.

137. With respect to the vehicles, the Panel finds that China Road and Bridge submitted sufficient evidence of its loss. Further, the Panel accepts China Road and Bridge's calculation of the value of the vehicles in the amount of US$77,100 at the time of the invasion.

138. With respect to the office equipment and furniture located in the management office, the Panel finds that China Road and Bridge submitted sufficient evidence of its loss. The Panel finds that the statement of the landlord is a critical piece of evidence in this regard. The Panel finds

that China Road and Bridge suffered a loss in the amount of US$315,544 for the tangible property located at the management office.

139. With respect to the office equipment and furniture located at the villa, China Road and Bridge did not submit sufficient evidence to demonstrate its loss. China Road and Bridge did not submit any evidence comparable to the landlord's statement regarding the losses associated with the management office. China Road and Bridge did not provide sufficient evidence of its ownership, or the value and presence of the tangible property located at the villa.

140. Under customary business practice, the financial statements of China Road and Bridge should have existed at its home office in China or, at the very least, with its auditors. The Panel finds that China Road and Bridge did not demonstrate that its stated loss was the direct result of the invasion and occupation of Kuwait.

3. Recommendation

141. The Panel recommends compensation in the amount of US$392,644 for loss of tangible property.

E. Payment or relief to others

1. Facts and contentions

142. China Road and Bridge seeks compensation in the amount of US$831,198 for payment and relief to others for the repatriation expenses for 6 executives from Iraq, 377 labourers from Kuwait, and 29 sports coaches from Kuwait.

143. China Road and Bridge stated that it evacuated 378 employees from Kuwait, but that Air China only billed it for 377 passengers. China Road and Bridge, therefore, seeks compensation for the airfares for 377 employees in the amount of US$461,448. China Road and Bridge seeks compensation in the amount of US$5,207 for its six managing executives. The sports coaches were evacuated from Kuwait via Air China at a cost of US$35,496. Accordingly, China Road and Bridge seeks a total of US$502,151 for compensation for airfare costs of evacuation.

144. In addition to the airfare, China Road and Bridge is seeking compensation in the amount of US$301,739 for the costs incurred during repatriation (i.e., food, medicine, out of pocket money) and consequential relief subsidies, salary and social welfare for each of the employees. China Road and Bridge is also seeking compensation in the amount of US$27,308 for the death of one employee who died during the evacuation from Iraq. This amount is for the funeral expenditures and relief subsidy provided to the deceased's family.

2. Analysis and valuation

145. The Panel finds that the repatriation and related costs for the employees of China Road and Bridge and for those whose welfare it was contractually responsible (see paragraphs 125 and 126, supra) are losses that are directly related to Iraq's invasion and occupation of Kuwait. China Road and Bridge provided lists of the names and payroll records of its employees and managing executives and a list of the names of the sports coaches, along with receipts issued by Air China.

146. From China Road & Bridge's claim of US$831,198 for payment or relief to others, the Panel has deducted an amount of US$5,878. This deduction represents the amount recommended by the category "C" Panel of Commissioners for departure expenses for four of the sports coaches who filed claims in category "C" in the total amount of US$5,878.

3. Recommendation

147. The Panel recommends compensation in the amount of US$826,320 for payment of relief to others.

F. Interest

148. For the reasons stated in paragraph 18, the Panel does not determine the compensability of claims for interest.

G. Claim preparation costs

149. China Road and Bridge reserved the right to claim for the costs incurred in preparing its claim. The Governing Council has directed the panels of Commissioners not to consider claim preparation costs at this time. Therefore, the Panel makes no recommendation for claim preparation costs.

H. Recommendation for China Road and Bridge

Table 4. Recommended compensation for China Road and Bridge

	Claim element	Claim amount (US$)	Recommended compensation (US$)
IV. A.	Contract losses (Iraq)	64,819,446	nil
B.	Contract losses (Kuwait)		
	1. Work performed	494,666	nil
	2. Prepaid rent	46,852	nil
	Sub-total	541,518	nil
C.	Loss of profits	138,543	nil
D.	Tangible property		
	Vehicles	77,100	77,100
	Management office	315,544	315,544
	Sports coaches' villa	345,610	nil
	Financial statements	272,000	nil
	Sub-total	1,010,254	392,644
E.	Payment or relief to others		
	Airfare	502,151	496,273
	Expenses	301,739	301,739
	Death subsidies	27,308	27,308
	Sub-total	831,198	825,320
	Total	67,340,959	1,217,964

150. Based on its findings regarding China Road and Bridge's claim, the Panel recommends compensation in the amount of US$1,217,964.

V. CLAIM OF INDUSTROGRADNJA d.d.

151. Industrogradnja d.d. ("Industrogradnja"), a Croatian company, seeks compensation in the amount of US$17,573,758 for contract losses, interest on contractual debt, costs of bank guarantees, tangible property losses, and evacuation costs in relation to three military construction projects in Iraq (the "Projects"). The Projects were:

(a) P-195 (contract signed in 1979 for contract works in the amount of US$112,383,379);

(b) P-500 (contract signed in 1979 for contract works in the amount of US$38,568,894); and

(c) P-196 (contract signed in 1980 for contract works in the amount of US$25,196,242).

152. The contracts for each of the Projects were signed by the Directorate of Air Force and Air Defense Works on behalf of the Ministry of Defense of Iraq.

Table 5. Industrogradnja's claim

Claim element	Claim amount (US$)
A. Contract losses	10,339,380
B. Interest	5,333,007
C. Bank guarantee costs	89,807
D. Tangible and missing property	1,677,899
E. Payment or relief to others	133,665
Total	17,573,758

A. Contract losses

153. Industrogradnja seeks compensation in the amount of US$10,339,380 for contract losses relating to the Projects.

154. Industrogradnja stated that all significant construction work on the Projects was completed prior to 2 August 1990. The dates of the last certified payments for each Project were March 1987 (contract P-196), March 1988 (contract P-195) and December 1988 (contract P-500).

155. The outstanding debt under the contracts was rescheduled pursuant to an intergovernmental deferred payment agreement dated 16 May 1990 (which came into effect on 7 October 1990), with 60 per cent of the total amounts

due under the contracts to be deferred for two years and paid between December 1992 and June 1995.

156. The Panel finds that all work performed on the Projects was completed prior to 2 May 1990. The deferred payment agreements did not constitute a new agreement, but merely arrangements for the deferred payment of existing obligations of Iraq. Accordingly, the contract losses are not within the jurisdiction of this Commission and are not compensable under Security Council resolution 687 (1991).

157. The Panel recommends no compensation for contract losses.

B. Interest on contractual debt

158. Industrogradnja seeks compensation in the amount of US$1,333,007 for interest on its contractual debt for the period from 1 January 1986 to 31 December 1990. The interest amounts formed part of the payments that were deferred under the intergovernmental agreement of 16 May 1990.

159. This loss element is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991).

160. The Panel recommends no compensation for interest on contractual debt.

C. Bank guarantee costs

161. Industrogradnja seeks compensation in the amount of US$89,827 for bank guarantee costs. Industrogradnja stated that the losses on its bank guarantees occurred because of delays in obtaining the final acceptance certificates from the Iraqi employer. Industrogradnja stated the failure to obtain the final acceptance certificates was the direct result of Iraq's invasion and occupation of Kuwait.

162. The Panel finds that Industrogradnja submitted sufficient evidence to demonstrate that it incurred and paid the bank guarantee costs during the period from 9 August 1989 to 8 October 1991. However, the Panel finds no evidence to suggest that the failure of the Iraqi employer to issue the final acceptance certificate was causally related to the invasion and occupation of Kuwait.

163. The Panel recommends no compensation for bank guarantee costs.

D. Loss of tangible property

1. Missing, expropriated or destroyed assets

(a) Facts and contentions

164. Industrogradnja seeks compensation in the amount of US$1,129,660 for loss of tangible property that was missing, expropriated or destroyed as a result of Iraq's invasion and occupation of Kuwait.

165. According to Industrogradnja, the assets were lost because it had to evacuate its personnel from the Project sites and because of the circumstances in Iraq at the time of the invasion. Industrogradnja states that part of its property was expropriated by the Iraqi army without payment of compensation and part of it was damaged beyond usefulness.

166. In support of its stated losses of tangible property, Industrogradnja submitted a statement made by its engineer. The engineer travelled to Iraq between 18 March and 18 April 1992 to assess the state of the property at the Projects. The engineer submitted a list of assets that he found to be missing, destroyed or expropriated.

167. For each category of missing, expropriated and destroyed assets, Industrogradnja also submitted:

(a) a summary list of the assets in question providing the following information: a sequence number, the Project for which the asset was used, a code for the asset, a short description of the asset, the identity of the supplier, the supplier invoice number and date, the value as per the invoice, the estimated value at the time of the loss and a short description of the documents establishing the presence of the goods in Iraq;

(b) the underlying documentation for each of the assets in question; and

(c) the statement of its engineer confirming the loss of each of the assets in question.

(b) Analysis and valuation

168. The Panel finds that Industrogradnja submitted sufficient evidence of the ownership, value, and presence of its tangible assets in Iraq. The Panel noted that the three Projects were completed by December 1988. However, the Panel finds no evidence that the losses incurred for missing, expropriated or destroyed assets were the direct result of Iraq's invasion and occupation of Kuwait.

(c) Recommendation

169. The Panel recommends no compensation for missing, expropriated or destroyed assets.

2. Assets to be re-exported

170. Industrogradnja seeks compensation in the amount of US$548,239 for equipment that was in the process of being re-exported out of Iraq in March 1989 but which, according to Industrogradnja, was unable to be re-exported due to the invasion.

171. Industrogradnja calculated its loss as 40 per cent of the value of the equipment and made a further reduction for damage and demolition and customs fines. Industrogradnja submitted a letter dated 12 November 1992 that referred to possible penalties that it "might" suffer.

172. The Panel finds that the losses suffered by Industrogradnja during its attempts to re-export equipment in 1989 are not the direct result of Iraq's invasion and occupation of Kuwait. Further, Industrogradnja did not submit any evidence to support the damage to the equipment or that it paid the customs fines at issue.

173. The Panel recommends no compensation for assets to be re-exported.

3. Recommendation

174. The Panel recommends no compensation for loss of tangible property.

E. Payment or relief to others

1. Facts and contentions

175. Industrogradnja seeks compensation in the amount of US$133,665 for the evacuation of two of its employees in September 1990. Industrogradnja stated that Iraq's invasion of Kuwait created concerns for the safety of its personnel, requiring immediate evacuation.

176. In support of its claim, Industrogradnja submitted a summary list of the evacuation costs that it incurred as well as invoices in respect of those expenses. The majority of the invoices are, however, without an English translation.

2. Analysis and valuation

177. Evacuation costs are, in principle, compensable. The Panel has held that temporary and extraordinary costs of evacuation or repatriation are compensable. However, the Panel finds that many of the costs included by Industrogradnja are not compensable.

178. Industrogradnja included, for instance, the costs of electricity, water, telephone, and a gardener for its office in Baghdad for the period 2 August 1990 to 2 March 1991. The largest single item is in the amount of US$77,000 for custom invoices. However, Industrogradnja did not explain how the losses of these items were a direct result of Iraq's invasion and occupation of Kuwait.

179. With respect to the evacuation costs of its two employees, Industrogradnja submitted airline tickets for dates in March and April of 1992. However, the two employees departed from Iraq on 24 September 1990.

180. The Panel finds that Industrogradnja included all of its expenses and overheads related to the maintenance of its Baghdad office for the period 2 August 1990 through 2 March 1991. Although Industrogradnja provided proof of payment of the majority of items, it did not demonstrate that the amounts incurred were temporary or extraordinary in nature, nor that the damage was a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

181. The Panel recommends no compensation for payment or relief to others.

F. Recommendation for Industrogradnja

Table 6. Recommended compensation for Industrogradnja

Claim element	Claim amount (US$)	Recommended compensation (US$)
A. Contract losses	10,339,380	nil
B. Interest	5,333,007	nil
C. Bank guarantee costs	89,807	nil
D. Tangible and missing property	1,677,899	nil
E. Payment or relief to others	133,665	nil
Total	17,573,758	nil

182. Based on its findings regarding Industrogradnja's claim, the Panel recommends no compensation.

VI. CLAIM OF ENERGOPROJEKT BUILDING AND GENERAL CONTRACTING COMPANY LIMITED

183. Energoprojekt Building and General Contracting Company Limited, ("Energoprojekt"), a company registered in the Federal Republic of Yugoslavia, seeks compensation in the amount of US$27,073,424 for losses related to the Navigation Lock No. 1 project located on the Shatt-Al-Basrah canal in Iraq (the "Project"). This claim is one of six separate claims that were submitted by the Energoprojekt group of companies. One claim has been dealt with in the Panel's First Report. The remaining claims will be dealt with in subsequent reports.

184. Energoprojekt signed a contract in October 1986 with the Iraqi Ministry of Agriculture and Irrigation State Commission for Irrigation and Reclamation Projects (the "Employer") for the execution of civil engineering works on the Project. In addition to the civil engineering works, Energoprojekt was to provide spare parts and special tools for a ten year period of operation and train the Employer's staff in the use of the equipment. Energoprojekt started work on 15 January 1987 and stated that it was actively engaged on the Project on 2 August 1990.

185. Energoprojekt stated that Iraq's invasion of Kuwait caused immediate alarm among all personnel and created concern for the immediate safety and security of its personnel working on the Project. All communications with its home office were shut down immediately after 2 August 1990. Energoprojekt continued to work at the Project site until September 1990 when it obtained permission from the Government of Iraq to repatriate its foreign personnel to their home countries. Energoprojekt submitted several eyewitness accounts of the events at the Project site. By 31 October 1990, only 25 per cent of the workforce remained on site. All personnel were repatriated by the end of 1990.

Table 7. Energoprojekt's claim

Claim element		Claim amount (US$)
A.	Contract losses	
	2a. Outstanding payments	10,519,819
	2b. Loan to employer	3,916,760
	2c. Retention money	954,940
	Subtotal	15,391,519
B.	Loss of profits	2,211,150
C.	Overheads	2,326,070
D.	Payments or relief to others	234,642
E.	Tangible property	6,910,043
	Total	27,073,424

A. Contract losses

1. Facts and contentions

186. Energoprojekt seeks compensation in the amount of US$15,391,519 for contract losses, including outstanding payments for work performed in the amount of US$10,519,819, a loan to the Employer in the amount of US$3,916,760, and unpaid retention money in the amount of US$954,940. The loss for outstanding payments includes (i) invoices for certified work, (ii) uncertified work, (iii) materials on site, (iv) undocumented materials, (v) confiscated materials, (vi) materials located outside Iraq, and (vii) transport charges.

187. The contract provided that the Employer would pay Energoprojekt an advance fee, issue a bank guarantee in favor of Energoprojekt and make payments on the monthly interim certificates for work performed within 15 days of approval. Monthly interim certificates were deemed approved if no comments were received within 30 days from the date of submission to the Employer's representative.

188. Energoprojekt received from the Employer an advance payment for mobilization and other costs in the amount of US$4,422,301, of which US$3,439,567 was unamortized, and a credit for materials in the amount of US$534,280.

189. Under the terms of the Project contract, the Employer deducted 10 per cent of the value of the work performed as retention money until the total amount deducted reached 5 per cent of the award of costs including contingencies. The Employer was to release 50 per cent of the retention money at the commencement of the maintenance period and the remaining 50 per cent upon the issuance of the final acceptance certificate.

190. Each interim certificate also included an item for 75 per cent of the value of supplies delivered to the Project and to be used in the permanent works. The remaining 25 per cent of the value of the supplies was payable at the time the supplies were incorporated into the permanent works.

191. The last progress payment application prior to 2 August 1990 was for interim c rtificate number 5 for work performed during the period 19 December 1989 to 17 June 1990. As further evidence of the work completed and payments made, Energoprojekt submitted the monthly interim certificates for all work performed since the Project started.

2. Analysis and valuation

(a) Outstanding payments

192. Energoprojekt seeks compensation in the amount of US$10,519,819 for outstanding payments. The Panel finds that the advance payment in the

amount of US$3,439,567 and the credit for materials in the amount of US$534,280 must be deducted from the amounts sought by Energoprojekt for outstanding payments. However, the Panel finds that equity requires that the deduction of the advance payment be made proportionately for each individual loss item.

193. The Panel finds that only the work performed after 2 May 1990 is within the jurisdiction of the Commission. The Panel also finds that Energoprojekt submitted sufficient evidence to demonstrate that the work was actually performed and materials supplied as set forth in interim certificate number 5 and approved by the resident engineer.

(i) Certified work and materials

194. Energoprojekt seeks compensation in the amount of US$2,833,432 for certified work and materials included in interim certificate number 4 (for the period between 1 May and 19 December 1989) and interim certificate number 5 (for the period between 19 December 1989 and 17 June 1990). In calculating the amount of its loss, Energoprojekt subtracted (i) all payments made from the total value of work performed from the commencement of the Project to 17 June 1990, (ii) the retention money owed, but not yet due, and (iii) a loan made to the Employer and payable in 10 equal semi-annual instalments after the issue of the provisional acceptance certificate.

195. As stated in paragraphs 11 and 12, only work performed after 2 May 1990 is within the jurisdiction of the Commission. Therefore, the Panel finds that work identified in interim certificate number 4 in the amount of US$2,294,627, for work performed between 1 May and 19 December 1989, is clearly outside the jurisdiction of the Commission.

196. The net value of work performed pursuant to interim certificate number 5 is US$538,805. Interim certificate number 5 covers a 181 day period from 19 December 1989 to 17 June 1990. In order to compensate Energoprojekt for the value of the work performed after 2 May 1990, the Panel adopts the recommendation of its expert consultants and prorates the value of work performed under interim certificate number 5 evenly over the 181 day period. Accordingly, the Panel finds that the value of the work performed for the 46 days between 2 May and 17 June 1990 is US$187,819. From this amount, the Panel deducts the proportional advance payment, resulting in a total recommended compensation amount of US$158,141 for work performed between 2 May and 17 June 1990.

197. Based on the findings above, the Panel recommends compensation in the amount of US$158,141 for work performed and materials certified.

(ii) Uncertified work

198. Energoprojekt seeks compensation in the amount of US$1,444,000 for work performed after 17 June 1990. Energoprojekt stated that the majority of its records were left at the Project site and has submitted a witness statement that contains only the estimated value of the work performed.

199. The Panel finds that Energoprojekt did not submit sufficient evidence to support the loss of payments for work performed after 17 June 1990. The witness statement does not provide specific information regarding the status of the Project, a description of the work performed, the quantity or value of the supplies on site, if any, or a calculation of the executed works. Further, Energoprojekt did not explain why records were available for work performed before 17 June 1990 and not for work performed after 17 June 1990. There is no information that would allow the Panel to differentiate between the documentation submitted for interim certificate 5 and the documentation that should have been submitted for work performed after 17 June 1990.

200. The Panel recommends no compensation for work performed after 17 June 1990.

(iii) Materials on site

201. Energoprojekt seeks compensation in the amount of US$383,571 for materials left at the Project site, excluding materials claimed in interim certificate number 5.

202. As noted in paragraph 190 supra, 75 per cent of the value of materials included in the interim certificates was invoiced to the Employer in the interim certificates. Energoprojekt seeks compensation for the remaining 25 per cent in the amount of US$383,571. The Panel finds that Energoprojekt submitted sufficient evidence to demonstrate its loss of this material. The Panel finds that the proportional advance payment must be deducted from the amount claimed.

203. The Panel recommends compensation in the amount of US$322,960 for materials left on site included in interim certificates, but not paid by the Employer.

(iv) Undocumented materials

204. With respect to materials not included in interim certificates and materials for which no records exist, Energoprojekt seeks compensation in the amount of US$1,117,629. Energoprojekt submitted invoices in the total amount of US$854,500 that specified delivery terms, but did not demonstrate that Energoprojekt owned or paid for the material, or that the material was actually imported into Iraq and delivered to the site. For the remaining amount of US$263,129, Energoprojekt had no records at all.

205. The Panel finds that Energoprojekt did not submit sufficient evidence to demonstrate its loss of materials that were not included in interim certificates.

206. The Panel recommends no compensation for materials not included in interim certificates.

(v) Confiscated materials

207. Finally, Energoprojekt seeks compensation in the amount of US$4,626,608 for material confiscated in 1992 by an agency of the Government of Iraq. Energoprojekt submitted several letters, all dated in May and June of 1992, from an Iraqi agency that informed Energoprojekt of the confiscation of equipment, plant and materials of foreign companies for the purpose of completing construction projects. Energoprojekt provided the list of equipment, plant and materials submitted to it by Iraq and customs declarations related to some of the items identified on this list.

208. The Panel finds that the take over of the equipment, plant and materials by an Iraqi agency in 1992 is not directly related to the invasion and occupation of Kuwait.

209. The Panel recommends no compensation for material confiscated in 1992 by an agency of the Government of Iraq.

(vi) Materials located outside Iraq

210. Energoprojekt seeks compensation in the amount of US$108,285 for materials in transit or stored in the former Yugoslavia. Energoprojekt submitted invoices from its suppliers as evidence of its losses.

211. With respect to the materials in transit, Energoprojekt submitted invoices dated between 6 and 24 July 1990. Energoprojekt stated that the materials included in these invoices were stopped and turned back at the border between Bulgaria and Turkey. Energoprojekt did not explain why the shipment of the materials was refused passage, nor did it submit any information concerning the dates or cost of shipment. Finally, Energoprojekt did not submit any evidence of payment for these materials.

212. For the materials stored in Belgrade, the invoices were dated from 9 August to 11 September 1990. For the materials stored in Stara Pazova, Energoprojekt submitted internal invoices from its Belgrade office to its office in Start Pazova, dated between 1 August and 10 September 1990. Energoprojekt did not submit any evidence of payment, delivery, or its attempts to mitigate its damages. Further, Energoprojekt did not submit sufficient evidence to demonstrate that the supplies stored in Stara Pazova were ordered specifically for the Project.

213. The Panel finds that Energoprojekt did not submit sufficient evidence to demonstrate that the loss of materials in transit or stored in its offices was the direct result of Iraq's invasion and occupation of Kuwait.

214. The Panel recommends no compensation for materials located outside Iraq.

(vii) Transport charges

215. Energoprojekt seeks compensation in the amount of US$6,294 for transport charges for delivery of concrete forms to Energoprojekt. In support of the transport charges, Energoprojekt submitted invoices dated between 16 August and 24 August 1990 and one invoice dated 17 January 1991. None of the invoices indicate the date of shipment or delivery. Energoprojekt did not submit evidence of payment or its attempts to mitigate damages by cancelling the orders.

216. The Panel finds that Energoprojekt did not submit sufficient evidence to demonstrate that the transport charges were the direct result of Iraq's invasion and occupation of Kuwait.

217. The Panel recommends no compensation for transport charges.

218. Based on the findings above, the Panel recommends compensation in the amount of US$481,101 for outstanding payments.

(b) Loan to Employer

219. Energoprojekt seeks compensation in the amount of US$3,916,760 for the unpaid amount of a loan made to the Employer in the amount of 51 per cent of the total value of the contract. The Employer was to repay the loan in 10 equal semi-annual instalments beginning six months after the issue of the provisional acceptance certificate. Additionally, the Employer was to supply cement for the Project, the value of which was considered a partial payment of the amounts due and owing on the loan. Energoprojekt deducted the value of the cement delivered by the Employer from the amount due and owing on the loan.

220. The Panel finds that Energoprojekt submitted sufficient evidence to support the existence of the obligation of the Employer under the terms of the contract. The Panel further finds that the Employer made no cash payments on the loan.

221. The Panel finds that the loan is a deferred payment agreement that allowed Iraq to delay its payment for work performed. Therefore, only the portion of the loan amount that is attributable to work performed and materials paid for after 2 May 1990 is within the jurisdiction of the Commission. Of the total amount sought, the Panel finds that US$816,508 is attributable to work performed under interim certificate number 5. Of this

amount, the Panel prorates the amount due for a total amount of US$207,556. Finally, the Panel subtracts the apportionment of the unamortized advance payment to arrive at a net amount of US$174,759.

222. The Panel recommends compensation in the amount of US$174,759 for the unpaid amounts of Energoprojekt's loan to the Employer.

(c) Retention money

223. Energoprojekt seeks compensation in the amount of US$954,940 for retention money withheld pursuant to the terms of the contract. Energoprojekt submitted all interim certificates for the life of the Project. Payments under the contract were in conformity with with the terms of that contract. Under the terms of the contract, 50 per cent of the retention money was to be paid on the date of issue of the provisional acceptance certificate.

224. The Panel finds that Energoprojekt submitted sufficient evidence to establish the amounts retained and that no payment of withheld retention money was made to Energoprojekt. The Panel further finds that the Project was ongoing on 2 August 1990 and that all interim certificates were paid on a timely basis by the Employer. After deduction of the pro-rata portion of the unamortized advance payment, the Panel finds that total amount of retention money due is US$804,045. The Panel finds that 50 per cent of this amount, or US$402,023, would have been due and owing on the date of issue of the provisional acceptance certificate.

225. The Panel finds that retention money is a form of security held by an employer to ensure fulfilment by a contractor of its obligations to complete the project and to remedy defects after take over of the completed project by the employer. In view of the fact that Energoprojekt was prevented from terminating the Project without fault, and because the parties should share the risk of non-completion, the Panel finds that Energoprojekt is entitled to 50 per cent of the retention money due and owing on the date of issue of the provisional acceptance certificate.

226. The Panel recommends compensation in the amount of US$201,011 for retention money.

3. Recommendation

227. Based on the above, the Panel recommends compensation in the amount of US$856,871 for contract losses.

B. Loss of profits

1. Facts and contentions

228. Energoprojekt seeks compensation in the amount of US$2,211,150 for loss of profits, approximately five per cent of the net contract sum. Energoprojekt stated that, as no other information was available, it adopted the five per cent profit rate from the original tender dating from 1985.

2. Analysis and valuation

229. The Panel finds that Energoprojekt's statement that a profit would have been made is unsupported by the facts available concerning the Project. Originally, the Project was to have been completed in 1989. Because of a dispute with a major subcontractor, Energoprojekt was required to assume a greater role than originally foreseen under the contract. Correspondence and internal minutes provided by Energoprojekt indicate that Energoprojekt intended to negotiate a further agreement with the Employer to avoid any potential contract claims against Energoprojekt by the Employer.

230. Further, the Panel finds that Energoprojekt did not submit financial statements, budgets, management reports, or accounts that would enable the Panel to determine that Energoprojekt might have made a profit despite the 18 month delay. In evaluating a loss of profits claim, the Panel requires clear and convincing evidence of ongoing and expected profitability. In the absence of such evidence, the Panel will not recommend compensation for loss of profits.

3. Recommendation

231. The Panel recommends no compensation for loss of profits.

C. Overheads for head office

232. Energoprojekt seeks compensation in the amount of US$2,326,070 for overheads for its head office. Energoprojekt stated that it expected to recover its site and head office overhead costs by payments made under the interim certificates throughout the duration of the Project and that it was unable to recover these costs as a result of the forced abandonment of the Project.

233. The Panel finds that overheads for head offices are costs that are included in the net price of the contract, but are not separate items that are chargeable to the Employer. In commercial contracts such as this one, the overheads are part of the non-recoverable items that are included in the rates charged by the contractor. As stated by Energoprojekt, those costs were expected to be recovered from the payments made under the interim certificates.

234. The Panel recommends no compensation for overheads for the head office.

D. Payment or relief to others

1. Facts and contentions

235. Energoprojekt seeks compensation in the amount of US$234,642 for the repatriation of 314 employees (238 Chinese nationals, 25 Thai nationals, 51 Yugoslav nationals). Energoprojekt includes airfare from Amman to the home country of the employee, hotel costs for some personnel in Amman, as well as "war risk payments" made to certain Yugoslav personnel.

2. Analysis and valuation

236. Energoprojekt seeks compensation in the amount of US$184,450 for the cost of air tickets for 238 Chinese employees. It provided payroll records for 189 employees for September 1990. Energoprojekt included a letter from the Economic Counsellor's Office from the Embassy of the People's Republic of China requesting the withdrawal of the remaining 185 Chinese people at the Navigation Lock No.1 project. In that letter, the Counsellor acknowledged that, as of 16 September 1990, 53 persons had already left, demonstrating that 238 Chinese workers were at the site at some point in time.

237. In support of its claim, Energoprojekt included proof of payment to the Bank of China for airline tickets issued in March 1990. Energoprojekt did not provide any evidence of its airfare costs for the 238 Chinese workers present in Iraq at the time of Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation for the evacuation costs of the 238 Chinese employees.

238. Energoprojekt seeks compensation in the amount of US$17,800 for the cost of air tickets for 25 Thai employees. Energoprojekt provided an invoice for 206 passengers routed from Amman to Bangkok, however it did not provide a list of Thai employees at the site or proof of payment of the invoice. The Panel recommends no compensation for the evacuation costs of the 25 Thai employees.

239. Energoprojekt seeks compensation in the amount of US$10,992 for the cost of air tickets for 51 Yugoslav employees and 11 family members. It provided a list of 39 employees who filed individual claims with the Commission and stated that no documentation is available for the remaining 12 workers employed at the site. Energoprojekt did not provide proof of payment to Yugoslav Airlines for the airfare costs of these employees. As part of its investigation, the Panel requested that the secretariat review the claims of the national airlines and the Federal Republic of Yugoslavia to verify whether Energoprojekt paid the airfare for its workers. Those claim files did not indicate that Energoprojekt paid the airfares for its

Yugoslav personnel. The Panel recommends no compensation for the evacuation of the Yugoslav nationals.

240. Energoprojekt seeks compensation in the amount of US$18,500 for war risk insurance premiums for 37 Yugoslav employees. It provides the bank transfer record as proof of payment. Additionally, Energoprojekt seeks compensation in the amount of US$2,900 for hotel costs in Amman. Energoprojekt provided the hotel invoices and proof of payment. The Panel finds that these items are temporary and extraordinary expenses related to repatriation, and are therefore compensable in the amount of US$21,400.

3. Recommendation

241. The Panel recommends compensation in the amount of US$21,400.

E. Loss of tangible property

1. Facts and contentions

242. Energoprojekt seeks compensation in the amount of US$6,910,043 for tangible property losses consisting of heavy plant and equipment, spare parts, temporary works, including camp buildings and associated fittings, fixtures and furniture, and other property confiscated by an agency of the Government of Iraq. Energoprojekt stated that the speed with which it evacuated its personnel prevented it from removing temporary works and installations or material for permanent works.

(a) Plant and equipment

243. For each item of plant and equipment, Energoprojekt submitted an itemized table that cross-referenced the description and identification, customs declarations, date of entry into Iraq, value in Iraqi dinar, applicable depreciation rate and the depreciated value of each item. Additionally, Energoprojekt submitted a copy of a list of temporarily imported equipment and vehicles which was signed by the Employer's resident engineer. Energoprojekt did not depreciate the value of spare parts.

244. Energoprojekt stated the depreciated value of the plant and equipment as US$5,087,223 and the value of the spare parts as US$305,900. Other than as described below, Energoprojekt did not submit invoices or proof of payment for plant and equipment or spare parts.

245. As a separate submission, Energoprojekt included the purchase agreements between Energoprojekt and one of its subcontractors from whom Energoprojekt purchased the plant and equipment. The agreements and its amendments indicated that the total purchase price of the plant and equipment was US$3,097,361. Of this purchase price, Energoprojekt paid nine per cent in cash, (i.e., US$278,762), with the remainder to be paid in equal instalments, commencing after the issue of the provisional acceptance

certificate. Energoprojekt's balance sheet, dated 15 February 1990, indicated its obligation to pay its subcontractor the amount of US$278,762 for the plant and equipment. It is unclear whether the plant and equipment purchased from the subcontractor is included in, or is separate from, the plant and equipment originally included in the claim.

(b) Temporary works

246. Energoprojekt seeks compensation in the amount of US$1,368,510 for temporary works, including prefabricated housing, office buildings, domestic and office furniture, and office equipment. Similar to its evidence for plant and equipment, Energoprojekt identified and described each item, cross referenced the customs declarations and applied various depreciation rates to arrive at the stated value.

(c) Confiscated property

247. Energoprojekt seeks compensation in the amount of US$148,410 for property confiscated by an agency of the Government of Iraq. Energoprojekt submitted several letters, all dated in May or June of 1992, from an Iraqi agency that informed Energoprojekt of the confiscation of the equipment, plant and materials of foreign companies for the purpose of completing construction projects. Energoprojekt provided a list of equipment, plant and materials submitted to it by Iraq and customs declarations related to some of the items identified on this list.

2. Analysis and valuation

(a) Plant and equipment

248. The Panel finds that Energoprojekt did not submit sufficient evidence to demonstrate its ownership of or payment for the plant and equipment losses included in its claim. Energoprojekt submitted a substantial number of documents that indicated that the plant and equipment were in Iraq at the time of Iraq's invasion of Kuwait. Further, Energoprojekt submitted sufficient evidence of its agreement to purchase plant and equipment from its subcontractor. However, Energoprojekt did not submit evidence demonstrating that Energoprojekt actually paid for the plant and equipment.

249. The Panel recommends no compensation for plant and equipment, including spare parts.

(b) Temporary works

250. The Panel finds that Energoprojekt did not submit sufficient evidence of its loss of temporary works. Energoprojekt submitted a table that set forth 24 items of loss and the depreciated value of each item. However, Energoprojekt did not submit purchase invoices or other proof of ownership.

Although the customs declarations establish that 13 items were imported into Iraq, there is no evidence of payment for, or ownership of, the items.

251. The Panel recommends no compensation for temporary works.

(c) Confiscated property

252. The Panel finds that the confiscation of the equipment, plant and materials by an agency of the Government of Iraq in 1992 is not directly related to the invasion and occupation of Kuwait.

253. The Panel recommends no compensation for confiscated property.

3. Recommendation

254. The Panel recommends no compensation for tangible property losses.

F. Interest

255. For the reasons stated in paragraph 18, the Panel does not determine the compensability of claims for interest.

G. Recommendation for Energoprojekt

Table 8. Recommended compensation for Energoprojekt

Claim element	Claim amount (US$)	Recommended compensation (US$)
A. Contract losses		
2a. Outstanding payments	10,519,819	481,101
2b. Loan to employer	3,916,760	174,759
2c. Retention money	954,940	201,011
Subtotal	15,391,519	856,871
B. Loss of profits	2,211,150	nil
C. Overheads	2,326,070	nil
D. Payment or relief to others	234,642	21,400
E. Tangible property	6,910,043	nil
Total	27,073,424	878,271

256. Based on its finds regarding Energoprojekt's claim, the Panel recommends compensation in the amount of US$878,271.

VII. CLAIM OF INDIAN RAILWAY CONSTRUCTION COMPANY

257. Indian Railway Construction Company ("Indian Railway") is an Indian public sector enterprise that was engaged in 1981 by the Government of Iraq to perform construction works on three infrastructure projects in Iraq: the Mussayeb Samawa Railway Project ("Project A"), the Al Muthanna Cement Project ("Project B") and a Fertilizer Plant Project at Baiji ("Project C"). Indian Railway seeks compensation in the amount of US$106,430,570 for contract losses, interest on contractual debt, loss of profits, tangible property losses, financial losses, head office expenses, guarantee expenses and lost Iraqi bank deposits that it incurred as a result of Iraq's invasion and occupation of Iraq.

258. According to Indian Railway, Projects A and B were completed prior to Iraq's invasion of Kuwait on 2 August 1990. Project C was 65 per cent complete as at the time of the invasion, and Indian Railway stated that it was unable to complete this project after the outbreak of hostilities.

Table 9. Indian Railway's claim

Claim element		Claim amount (US$)
A.	Contract losses	76,185,626
B.	Interest	19,220,179
C.	Loss of profits	1,367,890
D.	Tangible property	1,900,000
E.	Financial losses	2,248,952
F.	Head office expenses	747,266
G.	Continuing guarantee expenses	240,160
H.	Iraqi bank deposits	4,520,497
	Total	106,430,570

A. Contract losses

1. Facts and contentions

259. Indian Railway seeks compensation in the amount of US$76,185,626 for unpaid contractual debts for work performed on the three projects.

260. Indian Railway stated that Project A was completed on 31 December 1984, with handover occurring in May 1986. Because of the financial difficulties encountered by Iraq as a result of the war with Iran, a deferred payment arrangement system (effective 1 January 1984) was executed by the Governments of India and Iraq.

261. Indian Railway stated that Project B was completed on 5 July 1987, with handover occurring in 1989.

262. Indian Railway stated that 65 per cent of the work on Project C was completed on 2 August 1990.

263. Indian Railway stated that the foreign currency component of the contract for Project C was on deferred payment terms and that, from 1989 onwards, Iraq started to fall behind in its payment obligations. After the delays began, an agreement was entered into between the Governments of India and Iraq in 1990. Indian Railway stated that, notwithstanding this agreement, no payments were released by the Iraqi authorities because of the outbreak of hostilities as a result of Iraq's invasion of Kuwait.

2. Analysis and valuation

264. According to the dates of the work performed by Indian Railway, the majority of the contractual debt falls outside the jurisdiction of the Commission. The evidence originally submitted raised the possibility that some of the work in relation to Project C was performed between 2 May and 2 August 1990, in which case the claim for those amounts might have been within the jurisdiction of the Commission. Indian Railway was specifically asked to provide additional documentation that would indicate the dates on which work was performed under the Project C contract. In its reply, Indian Railway failed to give details of any work completed between these dates.

265. The Panel finds that the entire contract loss under Contracts A and B relate to work performed prior to 2 May 1990. The Panel further finds that the inter-governmental deferred payment agreement, effective 1 January 1984, did not have the effect of novating the debt for the purpose of Security Council resolution 687 (1991).

266. With respect to Project C, the Panel finds that although Indian Railway was specifically asked to provide evidence of the value of work completed between 2 May and 2 August 1990, it failed to do so. In the absence of requested evidence, the Panel finds that Indian Railway did not submit sufficient evidence to support its loss.

3. Recommendation

267. The Panel recommends no compensation for contract losses.

B. Interest on contractual debt

268. Indian Railway seeks compensation in the amount of US$19,220,179 for losses related to certified interest payable under the deferred payment arrangements applicable to Projects A and C.

269. The Panel finds that loss of interest with respect to Project A and part of Project C relate to contract losses that are excluded from the jurisdiction of the Commission. With respect to the loss of interest for work on Project C between 2 May and 2 August 1990, the Panel finds that

Indian Railway did not submit sufficient evidence in support of its stated loss.

270. The Panel recommends no compensation for interest on contractual debt.

C. Loss of profits

1. Facts and contentions

271. Indian Railway seeks compensation in the amount of US$1,367,890 for loss of profits on Project C. Indian Railway stated that it was unable to complete the work on Project C due to Iraq's invasion and occupation of Kuwait. According to Indian Railway, 65 per cent of the work was completed on 2 August 1990 and thereafter Iraq completed the work itself. Indian Railway stated that it filed a claim with Iraq for US$2.3 million for the loss of profits on Project C. In October 1992, Iraq, after considering Indian Railway's demand, recommended that a sum of US$1,367,890 be awarded on deferred payment terms. Indian Railway stated that it is not hopeful of receiving that sum.

2. Analysis and valuation

272. In support of its claim for loss of profits, Indian Railway provided a copy of minutes of meetings held from 10 to 14 October 1992 between delegates of Indian Railway and the Iraqi State Establishment for Implementation of Transportation and Communication Projects ("SEITAC"). From these minutes, it appears that Indian Railway and SEITAC agreed that the amount of US$1,726,958 (denominated in both United States dollars and Iraqi dinars) should be paid to Indian Railway. The dollar component was to be paid on deferred payment terms. However, this amount appears to include amounts extending beyond the loss of profits claim. The minutes make reference to losses related to the completion of Project C, a delay penalty and maintenance payments by SEITAC. The Panel finds that these minutes do not constitute evidence in support of loss of profits.

273. In its First Report the Panel found that a claimant seeking compensation for loss of profits must prove, first, that it had an existing contractual relationship at the time of the invasion. Secondly, the claimant must prove that the continuation of the relationship was rendered impossible by Iraq's invasion and occupation of Kuwait. Finally, the claimant must demonstrate that the contract would have been profitable as a whole. It is not sufficient to prove a profit at any stage before the completion of the project. (See paras. 145-147, First Report). Thus, Indian Railway must demonstrate that it would have been profitable to complete Project C.

274. Paragraph 5 of Governing Council decision 15 expressly states that the claimant seeking compensation for business losses such as loss of profits must provide "detailed factual descriptions of the circumstances of the

claimed loss, damage or injury" in order for compensation to be awarded. Accordingly, the Panel requires clear and convincing evidence of ongoing and expected profitability.

275. The Panel finds that Indian Railway failed to comply with the evidentiary standards referred to above.

3. Recommendation

276. The Panel recommends no compensation for loss of profits.

D. Loss of tangible property

277. Indian Railway seeks compensation in the amount of US$1,900,000 for loss of tangible property. Indian Railway stated that it was required to make available certain equipment and machinery for the execution of the projects and that it left behind this equipment and machinery on 2 August 1990. It further stated that Iraq and Indian Railway subsequently agreed on an amount of US$1,900,000 that would be paid on deferred payment terms in respect of this equipment and machinery. Indian Railway stated that under the present conditions the release of such funds is not likely to take place.

278. The loss of equipment and machinery is supported by a summary list of the assets in question drawn up by Indian Railway. There is no contemporaneous evidence of the purchase price or value of the assets in question or of the presence of those assets in Iraq. Indian Railway did not provide a copy of its agreement with Iraq whereby Iraq agreed to pay Indian Railway US$1,900,000 on deferred payment terms in respect of the equipment and machinery.

279. The Panel finds that Indian Railway did not provide sufficient evidence to support its loss of tangible property. Indian Railway did not provide evidence of ownership, date of acquisition, or original cost to verify the losses. Further, Indian Railway did not provide a list of the property with an acknowledgment by Iraq of its confiscation and the value of the property.

280. The Panel recommends no compensation for loss of tangible property.

E. Financial losses

281. Indian Railway seeks compensation in the amount of US$2,248,952 for expenses that it incurred in raising funds with foreign and Indian financial institutions in order to meet its liquidity requirements for the timely completion of the projects. Indian Railway stated that it became necessary for it to raise these additional funds due to the fact that Iraq delayed the release of the amounts due under the respective contracts.

282. The Panel finds that Indian Railway failed to demonstrate the direct link between the interest expenses incurred and Iraq's invasion and occupation of Kuwait. Further, Indian Railway did not demonstrate that any of the amounts due under the respective project contracts related to work that was performed between 2 May and 2 August 1990.

283. The Panel recommends no compensation for financial losses.

F. Head office expenses

284. Indian Railway seeks compensation in the amount for US$747,266 for expenses associated with maintaining a site office in Iraq for 30 months. Indian Railway calculated its loss as a percentage share of head office expenses based on the total expenses for the years 1990-1991 and 1991-1992. Indian Railway provided no evidence in support of this loss, although it was specifically asked to do so. Furthermore, Indian Railway did not specify for which 30-month period it seeks compensation.

285. The Panel finds that Indian Railway did not submit sufficient evidence to demonstrate that its stated loss was a direct result of Iraq's invasion and occupation of Kuwait or that it actually incurred such expenses.

286. The Panel recommends no compensation for head office expenses.

G. Continuing guarantee expenses

287. Indian Railway seeks compensation in the amount of US$240,160 for expenses associated with maintaining political risk insurance and government guarantees for the projects. Indian Railway stated that, because it was not paid under the project contracts, it had to extend the term of the guarantees and, in doing so, incurred additional expenses.

288. The Panel finds that Indian Railway failed to demonstrate the direct link between the guarantee expenses incurred and Iraq's invasion and occupation of Kuwait. Further, the Panel finds that Indian Railway did not provide adequate evidence of its losses.

289. The Panel recommends no compensation for continuing guarantee expenses.

H. Iraqi bank deposits

290. Indian Railway seeks compensation in the amount of US$4,520,497 for Iraqi dinar amounts held in two accounts with the Rafidain Bank, Baghdad on 31 March 1992. The precise nature and circumstances of the loss and the reason why this amount cannot be recovered are unclear and are not specified in the claim. Indian Railway did not provide any evidence of the existence and terms of the bank accounts.

291. The Panel finds that Indian Railway did not demonstrate that the accounts are no longer in existence or that Indian Railway was denied access to the funds.

292. The Panel recommends no compensation for loss of funds in Iraqi bank accounts.

I. Recommendation for Indian Railway

Table 10. Recommended compensation for Indian Railway

Claim element	Claim amount (US$)	Recommended compensation (US$)
A. Contract losses	76,185,626	nil
B. Interest	19,220,179	nil
C. Loss of profits	1,367,890	nil
D. Tangible property	1,900,000	nil
E. Financial losses	2,248,952	nil
F. Head office expenses	747,266	nil
G. Continuing guarantee expenses	240,160	nil
H. Iraqi bank deposits	4,520,497	nil
Total	106,430,570	nil

293. Based on its findings regarding Indian Railway's claim, the Panel recommends no compensation.

VIII. CLAIM OF HANYANG CORPORATION

294. Hanyang Corporation ("Hanyang"), a Korean construction company, seeks compensation in the amount of US$13,552,841 for contract losses, tangible property losses, and bank deposits. Hanyang was engaged by various agencies of the Government of Iraq to work as a general contractor on the Oil Pumping Station K-2, the Haifa Street Development Project, the Abu-Beshoot Irrigation and Drain Project, and the North Jazira Irrigation Project Nos. 1A and 1B.

Table 11. Hanyang's claim

Claim element	Claim amount (US$)
A. Contract losses	5,076,900
B. Tangible property	1,906,230
C. Iraqi bank credits	6,569,711
Total	13,552,841

A. Contract losses

1. Facts and contentions

295. Hanyang seeks compensation in the amount of US$5,076,900 for retention money on the five construction projects.

296. The completion certificates submitted by Hanyang indicate that (i) the Oil Pumping Station was commissioned on 10 November 1985; (ii) the Haifa Street Development Project was commissioned on 2 March 1988; and (iii) the Abu-Beshoot Irrigation and Drain Project was commissioned on 18 March 1988. Although the completion certificates were issued for the North Jazira Irrigation Project No. 1A and the North Jazira Irrigation Project No. 1B on 30 June 1989 and 22 September 1989, respectively, the final commissioning was still pending on the date of the claim (20 September 1994).

297. With regard to the work performed by Hanyang on the projects, the documents provided by Hanyang indicate that the construction period for the projects commenced as early as October 1981, in the case of the Haifa Street Development Project, and terminated at the latest in September 1989 in the case of the North Jazira Irrigation Project No. 1B.

2. Analysis and valuation

298. The Panel finds that the work performed on the five projects was performed prior to 2 May 1990. In each case, as of 2 May 1990, the completion certificate had been issued, and the final commissioning had already taken place on three of the projects. Only the North Jazira Irrigation Projects were in the maintenance period in the three months prior

to the invasion. However, Hanyang did not submit employer certificates that would indicate the breakdown of the retention money due on the projects. The Panel finds that there is insufficient evidence to support the contract losses for the retention money owed on any of the projects.

3. Recommendation

299. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

300. Hanyang seeks compensation in the amount of US$1,906,230 for loss of tangible assets, including heavy equipment and accessories, tools and small equipment, and spare parts and consumables. Hanyang stated that all of the tangible property was used on the project sites and was confiscated by the Iraqi authorities. According to Hanyang, a number of assets present on the project sites were in the process of being re-exported at the time of the invasion.

2. Analysis and valuation

(a) Heavy equipment and accessories

301. Hanyang submitted an inventory of assets with an stated value of US$1,906,230, but did not provide any evidence of ownership, importation of the equipment into Iraq or of the circumstances of the loss. Further, Hanyang did not identify on which project the heavy equipment was used. The Panel finds that Hanyang did not submit sufficient evidence of its stated loss.

(b) Tools and small equipment

302. In its statement of claim, Hanyang included a loss in the amount of US$200,000 for tools and small equipment. Because Hanyang did not submit any documentation regarding the tools and small equipment, the Panel finds that Hanyang does not have any evidence to support its loss.

(c) Spare parts and consumables

303. In its statement of claim, Hanyang included a loss in the amount of US$200,000 for spare parts and consumables. Because Hanyang did not submit any documentation regarding its loss, the Panel finds that Hanyang did not submit any evidence to support its loss of spare parts and consumables. Further the Panel finds it unlikely that such losses occurred as a direct result of Iraq's invasion and occupation of Kuwait, given that each of the projects was completed by 1989.

3. Recommendation

304. The Panel recommends no compensation for loss of tangible property.

C. Iraqi bank credits

305. Hanyang seeks compensation in the amount of US$6,569,711 for amounts held with the Central Bank of Iraq on 8 November 1993.

306. Hanyang stated that amounts owed in United States dollars under the project contracts were to be paid by the Iraqi employer into Hanyang's account at the Central Bank of Iraq. Under a contract with the Iraqi State Oil Marketing Organization ("SOMO"), Hanyang arranged to lift Iraqi crude oil against payment from its account. The last date on which Hanyang lifted crude oil was 21 August 1989. In July 1990, it was negotiating with SOMO to lift a shipment of crude oil in the amount of US$6.5 million, however, this shipment failed due to Iraq's invasion of Kuwait.

307. The Panel finds that Hanyang demonstrated that the credit is still in existence at the Central Bank of Iraq as of 8 November 1993. For this reason, Hanyang has established that its loss of the use of the credit was not a direct result of Iraq's invasion and occupation of Kuwait.

308. The Panel recommends no compensation for Hanyang's credit at the Central Bank of Iraq.

D. Recommendation for Hanyang

Table 12. Recommended compensation for Hanyang

Claim element	Claim amount (US$)	Recommended compensation (US$)
A. Contract losses	5,076,900	nil
B. Tangible property	1,906,230	nil
C. Iraqi bank credits	6,569,711	nil
Total	13,552,841	nil

309. Based on the its findings regarding Hanyang's claim, the Panel recommends no compensation.

IX. CLAIM OF ARCOM S.A.

310. Arcom S.A. Bucharest ("Arcom"), a Romanian company, submitted only the category "E" claim form, a statement of claim and other untranslated documents in support of its stated losses. Arcom seeks compensation in the amount of US$38,352,000 for losses relating to a "factory for chemical equipment", an "ammonia tank" and a "cement plant".

311. On 25 March 1998, Arcom was sent a notification under article 15 of the Rules requesting it to comply with the formal requirements for filing a claim. Arcom was requested to reply on or before 25 September 1998. Arcom did not submit a reply. On 1 October 1998, Arcom was sent a formal notification of the deficiencies of its claim as filed. The deadline for Arcom to reply was 1 December 1998. Arcom did not reply.

312. The Panel finds that Arcom did not submit sufficient information or documentation to support its asserted losses.

313. The Panel recommends no compensation for Arcom.

X. CLAIM OF FREEPORT MCMORAN RESOURCE PARTNERS

314. Freeport McMoran Resource Partners ("Freeport") is a United States corporation whose primary activities are in the fields of agricultural, minerals, sulphur, copper, gold, silver, and oil and gas. Freeport conducts world-wide sulphur operations, primarily through an unincorporated division named Freeport Sulphur Company. Freeport seeks compensation in the amount of US$10,301,346 for contract losses and interest.

Table 13. Freeport's claim

Claim element	Claim amount (US$)
A. Contract losses	8,921,393
B. Interest	1,379,953
Total	10,301,346

A. Contract losses

1. Facts and contentions

315. On 21 November 1988, Freeport and the Mishraq Sulphur State Enterprise (the "Employer") concluded a Sulphur Purification Plant Contract (the "Contract") pursuant to which Freeport was required to design, construct, deliver, commission and test a sulphur purification plant. The Contract required the Employer to make an initial payment, 23 monthly instalments and a final payment on satisfaction of the performance guarantee. Each payment was linked to a performance schedule.

316. On 2 August 1990, the work on the plant was approximately two months ahead of schedule. Freeport had completed the work required to entitle it to monthly payments 21, 22 and 23, due, respectively, on 21 August, 21 September and 21 October of 1990. Freeport stated that the Employer had made all payments on a timely basis prior to 2 August 1990 and that no disputes existed between the parties as of that date.

317. On 26 August 1990, the Employer sent a telex to Freeport stating that Freeport's refusal to send its commissioning team to the plant constituted a breach of the Contract. In a telex dated 28 August 1990, Freeport purported to invoke the force majeure clause contained in the general terms and conditions of the Contract.

318. On 15 January 1991, Freeport terminated the Contract pursuant to its terms and conditions on the grounds that several payments were more than 60 days overdue.

319. Freeport seeks compensation in the amount of US$8,921,393 for the unpaid payments 21 through 25.

2. Analysis and valuation

320. The Panel finds that the evidence provided by Freeport confirms the payment situation it described. Freeport was ahead of the performance schedule by approximately two months and demonstrated that it received payment in full for each of the prior payment periods. The Panel further finds that the performance of the work creating the contract loss took place after 2 May 1990 in each case.

321. As part of its calculation of its loss, Freeport deducted from the amount due under the Contract the costs it saved as a result of the interruption of performance. According to Freeport, these costs amounted to US$413,000. In support of this figure, Freeport submitted an affidavit from its controller, stating that the controller investigated the costs that would have been incurred and was satisfied that the amount of US$413,000 accurately represented the amount that was not expended due to the termination of the Contract.

322. In the same affidavit, the controller stated that Freeport had already paid in full all its subcontractors and vendors on the project.

323. The Panel finds that Freeport demonstrated its contract losses for payments 21 through 25 in the amount of US$9,334,393. The Panel further finds that costs of US$413,000 must be deducted from this amount to reflect the amounts saved by Freeport due to the termination of the project.

3. Recommendation

324. The Panel recommends compensation in the amount of US$8,921,393 for contract losses.

B. Interest on contract losses

325. Freeport seeks compensation in the amount of US$1,379,953 for interest compounded monthly on the amounts due under the Contract. The interest is calculated at rates ranging from 3.87 to 8.4 per cent. These rates are based on Freeport's cost of borrowing for its own capital needs.

326. For the reasons stated in paragraph 18, the Panel does not determine the compensability of claims for interest.

C. Recommendation for Freeport

Table 14. Recommended compensation for Freeport

Claim element	Claim amount (US$)	Recommended compensation (US$)
A. Contract losses	8,921,393	8,921,393
B. Interest	1,379,953	nil
Total	10,301,346	8,921,393

327. Based on its findings regarding Freeport's claim, the Panel recommends compensation in the amount of US$8,921,393.

XI. SUMMARY OF RECOMMENDATIONS BY CLAIMANT

328. Based on the foregoing, the Panel recommends the following amounts of compensation for direct losses suffered by the claimants as a result of Iraq's invasion and occupation of Kuwait:

(a) Agrocomplect Co. (Bulgaria): US$150,790;

(b) The China Road and Bridge Corporation (China): US$1,217,964;

(c) Industrogradnja d.d. (Croatia): nil;

(d) Energoprojekt Building & General Contracting Company Limited (the Federal Republic of Yugoslavia): US$878,271;

(e) Indian Railway Construction Company (India): nil;

(f) Hanyang Corporation (Republic of Korea): nil;

(g) Arcom SA Bucharest (Romania): nil; and

(h) Freeport McMoran Resource Partners (United States): US$8,921,393.

Geneva, 15 December 1998

(Signed) Mr. Werner Mellis
Chairman

(Signed) Mr. David Mace
Commissioner

(Signed) Mr. Sompong Sucharitkul
Commissioner